

AUG 27 1992

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

LIZZIE BEATRICE EASTERWOOD,

*Respondent.*

LIZZIE BEATRICE EASTERWOOD,

*Cross-Petitioner,*

v.

CSX TRANSPORTATION, INC.,

*Cross-Respondent.*

**On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

**BRIEF AMICUS CURIAE OF  
NATIONAL RAILROAD PASSENGER CORPORATION  
IN SUPPORT OF PETITIONER/CROSS-RESPONDENT  
CSX TRANSPORTATION, INC.**

Stephen C. Rogers  
Charles E. Mandolia  
National Railroad Passenger  
Corporation  
60 Massachusetts Avenue, N.E.  
Washington, D.C. 20002  
(202) 906-3995

Paul F. Mickey, Jr.\*  
Alvin Dunn  
Shaw, Pittman, Potts &  
Trowbridge  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

*Counsel for Amicus*

August 27, 1992

\*Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
INTEREST OF AMICUS CURIAE . . . . .	1
STATUTORY AND REGULATORY BACKGROUND . . . . .	7
Statutory Framework . . . . .	7
The Secretary's Railroad Safety Regulations . . . . .	8
SUMMARY OF ARGUMENT . . . . .	12
ARGUMENT . . . . .	13
I. FEDERAL LAW PREEMPTS MRS. EASTERWOOD'S SPEED CLAIM . . . . .	13
A. The Secretary of Transportation Has Promulgated Regulations That Cover the Subject Matter of Train Speeds Through Grade Crossings . . . . .	15
B. The State Common Law Rule Mrs. Easterwood Seeks to Enforce Does Not Fit Within the Savings Provision of Section 434 . . . . .	17
1. The Rule Mrs. Easterwood Seeks to Enforce Does Not Address a "Local Safety Hazard" Within the Meaning of Section 434 . . . . .	18
2. The Rule Mrs. Easterwood Seeks to Enforce Would Be Incompatible with the Secretary's Speed Regulations . . . . .	20
CONCLUSION . . . . .	23

## TABLE OF AUTHORITIES

Cases	Page
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985) . . . . .	13
<i>Central of Georgia Railroad Co. v. Markert</i> , 410 S.E.2d 437 (Ga. App.), cert. denied, 200 Ga. App. 895 (1991) . . . . .	21
<i>Chicago &amp; North Western Transportation Co. v. Kalo Brick &amp; Tile Co.</i> , 450 U.S. 311 (1981) . . . . .	15
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992) . . . . .	13, 14, 15
<i>Consolidated Rail Corp. v. Smith</i> , 664 F. Supp. 1228 (N.D. Ind. 1987) . . . . .	3
<i>Easterwood v. CSX Transportation, Inc.</i> , 933 F.2d 1548 (11th Cir. 1991), cert. granted, 112 S. Ct. 3024 (1992) . . . . .	passim
<i>Florida East Coast Railway Co. v. Griffin</i> , 566 So. 2d 1321 (Fla. Dist. Ct. App. 1990) . . . . .	21
<i>Florida Lime &amp; Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963) . . . . .	16
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990) . . . . .	13
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985) . . . . .	13
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) . . . . .	13
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972) . . . . .	14
<i>Ingersoll-Rand Co. v. McClendon</i> , 111 S. Ct. 478 (1990) . . . . .	13
<i>International Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987) . . . . .	15

	Page
<i>Johnson v. Southern Railway Co.</i> , 654 F. Supp. 121 (W.D.N.C. 1987) . . . . .	17, 18
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977) . . . . .	22
<i>Lara v. National Railroad Passenger Corp.</i> , No. CIV. H. 85-697, 1986 WL 15725 (N.D. Ind. May 27, 1986) . . . . .	3
<i>Morales v. TWA</i> , 112 S. Ct. 2031 (1992) . . . . .	13, 14
<i>Napier v. Atlantic Coast Line Railroad Co.</i> , 272 U.S. 605 (1926) . . . . .	16
<i>National Railroad Passenger Corp. v. City of Everett</i> , No. C89-834R (W.D. Wash. Oct. 4, 1989) . . . . .	3
<i>National Railroad Passenger Corp. v. Town of Broussard</i> , Civ. No. 91-0012 (W.D. La. July 2, 1992) . . . . .	3
<i>National Railroad Passenger Corp. v. Township of Pennsauken</i> , Civ. No. 89-1552 (D.N.J. Oct. 30, 1989) . . . . .	3
<i>Norfolk &amp; Western Railway Co. v. American Train Dispatchers Ass'n</i> , 111 S. Ct. 1156 (1991) . . . . .	14
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947) . . . . .	13
<i>San Diego Building Trades Council v. Garmon</i> , 359 U.S. 236 (1959) . . . . .	15
<i>Sisk v. National Railroad Passenger Corp.</i> , 647 F. Supp. 861 (D. Kan. 1986) . . . . .	3
<i>Southern Pacific Transportation Co. v. St. Charles Parish Police Jury</i> , 569 F. Supp. 1174 (E.D. La. 1983) . . . . .	3, 4, 18

	Page
<i>Southern Pacific Transportation Co. v. Town of Baldwin</i> , 685 F. Supp. 601 (W.D. La. 1987) . . . . .	3
<b>Constitutions</b>	
U.S. Const. art. I, § 8, cl. 3 . . . . .	17
<b>Statutes</b>	
Department of Transportation and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-143, 105 Stat. 917 (1991) . . . . .	2
Federal Railroad Safety and Hazardous Materials Transportation Control Act, 45 U.S.C. §§ 421-445 (1988) . . . . .	7
45 U.S.C. § 421 (1988) . . . . .	7
45 U.S.C. § 431 (1988) . . . . .	7
45 U.S.C. § 433(a) (1988) . . . . .	7
45 U.S.C. § 433(b) (1988) . . . . .	7, 8, 19
45 U.S.C. § 434 (1988) . . . . .	passim
Rail Passenger Service Act, 45 U.S.C. §§ 501-658 (1988) . . . . .	1
45 U.S.C. § 501a(6) (1988) . . . . .	2
45 U.S.C. § 501a(8) (1988) . . . . .	2
45 U.S.C. § 501(a) (1988) . . . . .	2
45 U.S.C. § 541 (1988) . . . . .	2
45 U.S.C. § 543(a)(1)(A) (1988) . . . . .	2
45 U.S.C. § 548 (1988) . . . . .	5
45 U.S.C. § 561 (1988) . . . . .	2
45 U.S.C. § 562(e)(1) (1988) . . . . .	2

	Page
45 U.S.C. § 562(f) (1988) . . . . .	2
45 U.S.C. § 656 (1988) . . . . .	2, 16
<b>Regulations and Administrative Notices</b>	
23 C.F.R. pt. 625 (1992) . . . . .	20
23 C.F.R. § 646.214(b)(1) (1992) . . . . .	10
23 C.F.R. § 646.214(b)(3)(i) (1992) . . . . .	10
23 C.F.R. § 655.601 (1992) . . . . .	10
23 C.F.R. § 655.603(a) (1992) . . . . .	10
49 C.F.R. § 1.49(m) (1991) . . . . .	8
49 C.F.R. § 213.9 (1991) . . . . .	passim
49 C.F.R. § 213.9(c) (1991) . . . . .	10, 17, 22
49 C.F.R. § 213.37 (1991) . . . . .	20
49 C.F.R. § 213.57 (1991) . . . . .	9
Notice of Proposed Rule Making, 36 Fed. Reg. 11,974 (1971) . . . . .	9, 12, 21
Notice of Proposed Rule Making and Public Hearing, 37 Fed. Reg. 18,397 (1972) . . . . .	9
<b>Legislative History</b>	
H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104 . . . . .	15, 18
Statement of Rep. Springer, 116 Cong. Rec. 27,612 (1970) . . . . .	18
<b>Other Authorities</b>	
American Ass'n of State Highway and Transp. Officials, <i>A Policy on Geometric Design of Highways and Streets</i> (1990) . . . . .	20



	Page
Federal Highway Admin., U.S. Dep't of Transp., <i>Manual on Uniform Traffic Control Devices for Streets and Highways, adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601 and .603(a) (1992)</i> . . . . .	passim
Federal Highway Admin., U.S. Dep't of Transp., <i>Rail-Highway Crossings Study (1989)</i> . . . . .	passim
Federal Highway Admin., U.S. Dep't of Transp., <i>Railroad-Highway Grade Crossing Handbook (2d ed. 1986)</i> . . . . .	3, 4
Federal R.R. Admin., U.S. Dep't of Transp., <i>Rail- Highway Crossing Accident/Incident and In- ventory Bulletin No. 13 (July 1991)</i> . . . . .	5
Highway Research Bd., Nat'l Coop. Highway Re- search Program Rep. No. 50, <i>Factors Influenc- ing Safety at Highway-Rail Grade Crossings (1968)</i> . . . . .	20
Interstate Commerce Comm'n, U.S. Dep't of Com- merce, Rep. No. 33440, <i>Prevention of Rail- Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles</i> , 322 I.C.C. 1 (1964) . . . . .	3, 4
National R.R. Passenger Corp., <i>1991 Annual Report (1992)</i> . . . . .	5

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,  
*Petitioner,*

v.

LIZZIE BEATRICE EASTERWOOD,  
*Respondent.*

LIZZIE BEATRICE EASTERWOOD,  
*Cross-Petitioner,*

v.

CSX TRANSPORTATION, INC.,  
*Cross-Respondent.*

On Writs of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

**BRIEF AMICUS CURIAE OF  
NATIONAL RAILROAD PASSENGER CORPORATION  
IN SUPPORT OF PETITIONER/CROSS-RESPONDENT  
CSX TRANSPORTATION, INC.**

**INTEREST OF AMICUS CURIAE**

The National Railroad Passenger Corporation ("Amtrak") is a government-funded corporation created by Congress in 1970 to assume responsibility for operating the country's inter-city passenger trains.<sup>1</sup> Congress has directed Amtrak "to pro-

<sup>1</sup> In 1970 Congress enacted the Rail Passenger Service Act, Pub. L. No. 91-518, 84 Stat. 1327 (codified at 45 U.S.C. §§ 501-658 (1988)) ("RPSA"), authorizing the creation of Amtrak as a for-profit corporation responsible

vide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements." 45 U.S.C. § 541 (1988).

Speed is critical to Amtrak's success. In order to meet its congressional mandate, Amtrak must be able to provide reliable high-speed service that will attract a significant ridership. 45 U.S.C. § 501(a). Congress has specifically instructed Amtrak to strive to achieve a system-wide average speed of at least 60 m.p.h., 45 U.S.C. § 501a(8), and to operate its trains to all station stops within fifteen minutes of the time established in public timetables for such operation. 45 U.S.C. § 501a(6). Recognizing the importance of speed in Amtrak's effort to attract passengers, Congress included several provisions in the RPSA encouraging Amtrak to travel at the highest possible speeds that are consistent with safe and efficient operations.<sup>2</sup>

for providing intercity rail passenger service throughout the United States. 45 U.S.C. § 541 (1988). Amtrak inherited routes, personnel, and equipment from the passenger services of many of the nation's freight railroads, including Petitioner CSX Transportation, Inc. ("CSXT"). 45 U.S.C. § 561. Although Amtrak is not an agency or establishment of the United States Government, 45 U.S.C. § 541, its annual operating deficits are federally funded, Department of Transportation and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-143, 105 Stat. 917 (1991), and by statute the Secretary of Transportation sits as an ex officio member of Amtrak's Board of Directors. 45 U.S.C. § 543(a)(1)(A).

<sup>2</sup> Two provisions address Amtrak's rights to use track owned by freight railroads. Because freight trains operate at slower speeds than Amtrak's trains, Amtrak has priority over freight trains in the use of any given section of track. 45 U.S.C. § 562(e)(1). Where freight railroads refuse to permit Amtrak to operate at higher speeds over their track, Amtrak may petition the Secretary for an order permitting higher speeds. 45 U.S.C. § 562(f). A third provision concerns state or local speed restrictions that involve local safety hazards and that impede Amtrak's ability to provide high-speed rail passenger service. It directs Amtrak to identify these speed restrictions and to attempt to persuade state and local officials to deal with the local safety hazards through other means. 45 U.S.C. § 656.

Amtrak has frequently instituted legal action to eliminate state and local speed restrictions that impede its ability to provide high-speed rail passenger service and has consistently persuaded courts to declare them invalid, most often on the basis of federal preemption.<sup>3</sup> Amtrak has challenged speed restrictions not merely in order to meet its statutory speed and service goals, but also because, for at least three reasons, slower speeds are not necessarily safer speeds.

(1) Unlike a car or truck, a train has a limited ability to reduce its speed in response to a safety hazard. Even at a speed of 30 m.p.h., by the time a passenger train engineer discerns an obstacle on the track ahead, it is generally too late to stop.<sup>4</sup>

(2) Slower speeds may actually increase the risk that motorists will cause grade crossing accidents. When

<sup>3</sup> *National R.R. Passenger Corp. v. Town of Broussard*, Civ. No. 91-0012 (W.D. La. July 2, 1991); *National R.R. Passenger Corp. v. Township of Pennsauken*, Civ. No. 89-1552 (D.N.J. Oct. 30, 1989); *National R.R. Passenger Corp. v. City of Everett*, No. C89-834R (W.D. Wash. Oct. 4, 1989); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987); *Southern Pac. Transp. Co. v. Town of Baldwin*, 685 F. Supp. 601 (W.D. La. 1987); *Southern Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174 (E.D. La. 1983). Amtrak has also successfully challenged speed restrictions sought to be imposed under state common law. *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986); *Lara v. National R.R. Passenger Corp.*, No. CIV. H. 85-697, 1986 WL 15725 (N.D. Ind. May 27, 1986).

<sup>4</sup> See, e.g., Interstate Commerce Comm'n, U.S. Dep't of Commerce, Rep. No. 33440, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 I.C.C. 1, 77 (1964) ("ICC Rep.") (Due to its extreme weight [approximately 1,000 tons], "a passenger train consisting of eight cars and three diesel units traveling between 45 and 50 miles per hour would require approximately 2,000 feet within which to stop under emergency application of the train brakes."); Federal Highway Admin., U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 44 (2d ed. 1986) ("DOT Grade Crossing Handbook") (A typical 100-car freight train traveling 60 m.p.h. would require over one mile to stop in emergency braking.). In addition, sudden deceleration poses its own serious safety risks. See Federal Highway Admin., U.S. Dep't of



trains travel at higher speeds, drivers are more likely to obey the warning devices at grade crossings. When trains travel more slowly, drivers are more likely to ignore warning devices and attempt to drive through the crossing in front of the train in order to avoid a lengthy delay.<sup>5</sup>

(3) In some circumstances, particularly involving curved track, reducing train speeds to 25 m.p.h. or less may increase the chance of derailment.<sup>6</sup>

In large part because it has succeeded in increasing the speed of its trains, Amtrak is nearing achievement of its statu-

---

Transp., *Rail-Highway Crossings Study*, 5-10 (1989) ("DOT Crossings Study") ("A train in an emergency braking situation is subject to derailling, as well as to injury to passengers, and damage to lading, wheels, and brake systems.").

<sup>5</sup> See, e.g., *DOT Grade Crossing Handbook* at 41:

[S]ome communities have passed ordinances restricting train speed for the purpose of improving safety. However, this practice directly reduces the level of service for highway traffic and may also affect safety. Because of the longer period of time during which the crossing is closed to highway traffic, a motorist may take risks by passing over the crossing just ahead of a train. In many cases, risks such as these are not successful and collisions result.

In addition, numerous studies have concluded that motorists, not railroads, are largely responsible for grade crossing accidents. See, e.g., *ICC Rep.* at 82 ("Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the [grade crossing] hazard . . ."); *DOT Crossings Study* at 4-20 ("More than half of all rail-highway crossing accidents are the result of a motorist driving around lowered gates or proceeding through flashing red lights without stopping.").

<sup>6</sup> *St. Charles Parish*, 569 F. Supp. at 1177 (Crediting expert testimony, court found that "due to harmonic roll and track/train dynamics, the effect of reducing train speed to 25 mph or less actually increases the likelihood of railroad car derailments."). This problem affects heavy freight trains most directly.

tory speed goal and has been able to enhance the appeal of its service to the traveling public.<sup>7</sup> Amtrak presently provides intercity rail passenger service in 45 states and serves over 22,000,000 passengers per year.<sup>8</sup>

Amtrak submits this brief *amicus curiae* because it has a vital interest in the preemptive scope of federal railroad safety regulations, particularly those concerning train speed. State or local requirements that forced Amtrak to lower its operating speeds would cripple Amtrak's ability to meet Congress's specific speed goal and Congress's broader objective that Amtrak provide efficient rail passenger service at the lowest possible cost to the federal taxpayer. A requirement that Amtrak reduce its speed when approaching a grade crossing would be particularly disruptive. Amtrak trains travel through 14,485 grade crossings nationwide.<sup>9</sup> Slowing down at these crossings would dramatically increase both travel times and operating expenses, and would do little or nothing to increase safety.<sup>10</sup>

---

<sup>7</sup> Amtrak's system-wide average speed is approximately 55 m.p.h., and in 1991 its on-time percentage was 77 percent.

<sup>8</sup> These statistics are set forth in annual reports Amtrak is directed to submit to the President and the Congress under 45 U.S.C. § 548. See *National R.R. Passenger Corp., 1991 Annual Report* (1992). Amtrak also provides commuter rail passenger service in six states under contracts with local transportation authorities, serving over 18,000,000 passengers per year. *Id.*

<sup>9</sup> See *Federal R.R. Admin., U.S. Dep't of Transp., Rail-Highway Crossing Accident/Incident and Inventory Bulletin No. 13* (July 1991).

<sup>10</sup> Amtrak has estimated that reducing its operating speeds at grade crossings to 30 m.p.h. would lengthen a typical route's schedule by 36 percent and reduce Amtrak's average speed over that route to 37 m.p.h. Increases in operating expenses would ultimately be borne by the federal taxpayer. See *supra* note 1. As noted above, this serious degradation of rail passenger service would do little to enhance safety — in all likelihood a train traveling at 30 m.p.h. still would not be able to stop in time to avoid a collision with a vehicle that entered the grade crossing — and safety could well be diminished.

Amtrak also has a vital interest in the preemption of state laws concerning grade crossing safety. Amtrak has been in the vanguard of efforts to promote safety at grade crossings nationwide and has committed substantial resources to Operation Lifesaver, a national program to educate motorists and pedestrians about the hazards of grade crossings. As an operator of passenger service in 45 states, Amtrak has a strong interest in maintaining a uniform national approach to grade crossing safety, and in finding solutions that do not needlessly reduce maximum speeds for passenger trains.<sup>11</sup>

This brief deals solely with the preemptive effect of federal regulations governing train speeds and supports affirmance of the Court of Appeals in No. 91-1206. Amtrak agrees with the views of CSXT and *amicus curiae* Association of American Railroads ("AAR") that Respondent Lizzie Beatrice Easterwood's grade crossing claim is also preempted, and thus Amtrak supports reversal of the Court of Appeals in No. 91-720.

<sup>11</sup> Even though Amtrak is not responsible for maintaining the vast majority of the grade crossings it uses, it bears the ultimate financial burden for any grade crossing accidents involving its trains. Amtrak owns most of the track over which it operates in the Northeast Corridor (Boston to Washington, D.C.) and has eliminated nearly all of the grade crossings on this line. Outside the Northeast Corridor, Amtrak operates over the lines of private freight railroads, including CSXT, pursuant to agreements entered into with these railroads when Amtrak commenced operations in 1971. Under these agreements, Amtrak is required to pay virtually all of the costs of grade crossing accidents involving its trains, though it has no control over the protective devices at these grade crossings.

## STATUTORY AND REGULATORY BACKGROUND

### Statutory Framework

In the late 1960s, Congress became alarmed at the increasing rate and severity of railroad accidents across the nation. In 1970, Congress passed the Federal Railroad Safety and Hazardous Materials Transportation Control Act, Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 45 U.S.C. §§ 421-445 (1988)) ("FRSA"), with the express purpose of substantially improving railroad safety: "[T]he purpose of [the Act] is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents involving any carrier of hazardous materials." 45 U.S.C. § 421. Congress determined that improving railroad safety required a comprehensive national approach coordinated by the federal government. Congress thus directed the Secretary of Transportation to "(1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety." 45 U.S.C. § 431.

Congress believed that the grade crossing problem required particular attention. It directed the Secretary to study "the problem of eliminating and protecting railroad grade crossings," 45 U.S.C. § 433(a), and to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . . ." 45 U.S.C. § 433(b). The Secretary was directed to exercise not only the authority provided by the FRSA, but also his authority over highway, traffic, and motor vehicle safety and highway construction. *Id.*

Congress also determined that the Secretary's regulations should have broad preemptive effect. Congress therefore in-



cluded in the FRSA an express statement of the Act's preemptive scope:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434.

### The Secretary's Railroad Safety Regulations

The Secretary has adopted rules that cover virtually every aspect of railroad operation, address many facets of highway and street safety, and fill nearly two volumes of the *Code of Federal Regulations*.<sup>12</sup> This case concerns only two issues covered by the Secretary's regulations — train speed and grade crossings. As noted above, Amtrak submits this brief solely on the issue of train speed.

The Secretary's train speed regulations establish maximum allowable operating speeds for six separate classes of track. Passenger trains are subject to one set of speeds (15 to

<sup>12</sup> The Secretary has delegated to the Federal Railroad Administrator his authority to carry out his functions under the FRSA, with the exception of his functions under the Act's grade crossing provision, 45 U.S.C. § 433(b), which concerns highway, traffic, and motor vehicle safety and highway construction. 49 C.F.R. § 1.49(m) (1991).

110 m.p.h.) and freight trains are subject to another (10 to 110 m.p.h.). 49 C.F.R. § 213.9 (1991).<sup>13</sup> In general, passenger train speeds are significantly higher than those for freight trains; for example, on a straight section of Class 4 track, Amtrak is authorized to operate at 80 m.p.h., while freight trains are limited to 60 m.p.h. The Secretary has also established a formula for calculating maximum allowable speeds for both freight and passenger trains on curved track. 49 C.F.R. § 213.57.<sup>14</sup>

The Secretary considered a broad range of safety data when setting maximum allowable operating speeds.<sup>15</sup> That he

<sup>13</sup> The maximum allowable operating speeds in miles per hour are as follows:

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90
Class 6 track	110	110

49 C.F.R. § 213.9.

<sup>14</sup> The Secretary originally published speed limits that would apply to all trains, passenger and freight. Notice of Proposed Rule Making, 36 Fed. Reg. 11,974, 11,975 (1971). Amtrak petitioned the Secretary to establish higher speed limits for passenger trains operating over classes 1 through 5 track. The Secretary increased these speed limits, finding that "passenger trains can move faster than freight trains over classes 1 through 5 track with no loss in safety." Notice of Proposed Rule Making and Public Hearing, 37 Fed. Reg. 18,397, 18,397 (1972).

<sup>15</sup> See 36 Fed. Reg. at 11,974. ("[The Secretary] considered information available within [the Department] and information as to 'existing safety data and standards' made available to it by representatives of the Association of American Railroads, railroad industry, railroad labor organizations, and State regulatory agencies.").

was concerned with numerous safety risks, including grade crossing accidents as well as derailments, is confirmed by subsection (c) of 49 C.F.R. § 213.9. That subsection provides that when the Secretary addresses a railroad's request for a maximum operating speed that exceeds 110 m.p.h., he will consider "performance characteristics of the track, signaling, grade crossing protection, trespasser control where appropriate," and other factors in determining whether "the proposed speed can be sustained in safety." 49 C.F.R. § 213.9(c). In setting maximum speeds, the Secretary was well aware of prior Department of Transportation and Interstate Commerce Commission studies suggesting that in many cases lower speeds could increase the likelihood of grade crossing accidents and possibly the risk of derailments as well. See *supra* note 5.

The Secretary also took into account those accepted principles of railroad safety and train dynamics in establishing comprehensive regulations covering grade crossing safety. Under the grade crossing regulations, train speed is an important consideration in determining what types of warning devices should be installed at a grade crossing. Federal Highway Admin., U.S. Dep't of Transp., *Manual on Uniform Traffic Control Devices for Streets and Highways* 8A-1, adopted as law at 23 C.F.R. §§ 646.214(b)(1), 655.601 and .603(a) (1992) ("MUTCD").<sup>16</sup> Significantly, the Secretary did not adopt an approach whereby trains would be required to proceed more slowly at grade crossings; instead, because that approach was both impracticable and unlikely to promote safety, the Secretary chose to allow trains to travel through grade crossings

<sup>16</sup> Speed is specifically addressed in the Secretary's grade crossing regulations. For example, the Secretary has concluded that train speed must be considered when determining whether to install automatic gates with flashing lights. 23 C.F.R. § 646.214(b)(3)(i). See also *MUTCD* at 8C-5 (speed considered in setting automatic flashing lights); *MUTCD* at 8B-5 (speed considered in determining appropriate illumination).

at speeds deemed safe in light of track characteristics and configuration, and opted to minimize grade crossing accidents by prescribing the use of various devices to warn motorists.<sup>17</sup> Speed, in other words, was treated as the baseline parameter to which decisions on other precautions would be accommodated.

The Secretary's determination to take train speed as a baseline is confirmed by the way his regulations address the hazard created when different trains traverse a grade crossing at significantly different speeds. Signals warning motorists of approaching trains must be timed according to train speed, and proper timing is critical: too short a warning has obvious dangers, while too long a warning may encourage motorists to drive around gates or through signals.<sup>18</sup> One way to have signals timed correctly for all trains would be to require all trains to travel at the lowest common denominator of authorized speed. The Secretary adopted quite a different approach: the regulations allow trains to operate through a grade crossing at significantly different speeds, and call for the installation of more sophisticated sensing devices so that faster trains will be detected and warnings will be given to motorists at the appropriate time.<sup>19</sup>

In adopting regulations on maximum allowable train speeds, including maximum speeds through grade crossings, the Secretary made judgments that expressly involved cost-

<sup>17</sup> 49 C.F.R. § 213.9; see also *supra* note 16.

<sup>18</sup> See *DOT Crossings Study* at 4-6 ("Care must also be taken to ensure that the warning time is not excessive. If the roadway user cannot see the train approaching, he may attempt to cross the tracks despite the operation of the flashing light signals — and even lowered gates, if present."). See also *supra* note 5.

<sup>19</sup> See *MUTCD* at 8C-5 ("Where the speeds of different trains on a given track vary considerably under normal operation, special devices or circuits should be installed to provide reasonably uniform notice in advance of all train movements over the crossing.").



benefit calculations. The Secretary recognized specifically that his speed limit regulations have both costs and benefits:

[E]very safety regulation has a cost factor, either a direct purchase and operation cost or an indirect cost resulting from operating at less than maximum efficiency. Every safety regulation also has a benefit factor — the increase in safety to the public and railroad personnel and a benefit to the railroads in reducing its casualty losses and damage claims. Although the cost of complying with a regulation may be initially borne by the railroad, it is ultimately paid by the public. Thus, the cost/benefit determination to be made by the FRA with respect to a particular safety requirement is whether the safety benefit to the public and railroad personnel justifies the ultimate monetary cost of compliance to the public.

36 Fed. Reg. at 11,974. Recognizing that the public has an interest in both safety and efficiency, and that train speed is an important component of efficiency, the Secretary adopted speed limits that would permit the fastest rate of travel consistent with safe operation. He presumably also recognized that in setting speeds at the maximum safe level, he was promoting Congress's statutory goal of allowing intercity passenger trains to provide enhanced service to the traveling public.

### SUMMARY OF ARGUMENT

This case considers whether federal law preempts Mrs. Easterwood's claim that the CSXT train, though moving well below the federal maximum track speed, was nevertheless violating state common law by traveling at an excessive speed through the Cook Street grade crossing. Amtrak respectfully submits that her claim is preempted by the FRSA and rules promulgated by the Secretary of Transportation relating to railroad safety. Congress has expressly declared in the FRSA that railroad safety rules should be nationally uniform and that safety rules promulgated by the Secretary of Transportation

shall preempt any state rules covering the same subject matter. The Secretary has established comprehensive rules for train speeds, including speeds through grade crossings, and under the plain language of 45 U.S.C. § 434 those rules preempt Mrs. Easterwood's state common law claim.

## ARGUMENT

### I. FEDERAL LAW PREEMPTS MRS. EASTERWOOD'S SPEED CLAIM

The Court's preemption principles are well settled. Whether a federal enactment preempts state law turns on congressional intent, the "ultimate touchstone" of preemption analysis. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). To determine congressional intent, the Court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. TWA*, 112 S. Ct. 2031, 2036 (1992) (quoting *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990)).<sup>20</sup>

<sup>20</sup> Congress can indicate its intent to preempt state law in two ways: (1) expressly, by so stating on the face of the statute, or (2) impliedly, by enacting rules or regulations that comprehensively govern an entire field, such that there is no room for additional regulation by the states. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Even if Congress fails to express its intent to displace state law, state law is preempted to the extent it actually conflicts with federal law. This conflict often arises when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Court in *Cipollone* noted that when Congress has included in the statute a provision explicitly addressing preemption, as Congress did in § 434, there is no need to look beyond that provision to determine the statute's preemptive scope. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992).



Here Congress's intent is clear. The FRSA expressly states that the Secretary of Transportation should promulgate comprehensive rules covering railroad safety and that all rules "relating to railroad safety" should, if practicable, be nationally uniform. 45 U.S.C. § 434.<sup>21</sup> The FRSA also expressly provides that once the Secretary adopts a rule covering a particular subject matter, all state rules covering that subject matter are preempted. The FRSA provides an exception to its general declaration of preemption, but a narrow one: a state rule may survive only if it addresses "an essentially local safety hazard," is not incompatible with federal law, and does not unduly burden interstate commerce. 45 U.S.C. § 434.

There can be no doubt that the FRSA preempts state common law — such as the common law duty Mrs. Easterwood seeks to enforce in this action — as well as state statutory law. Section 434 preempts any state "law, rule, regulation, order, or standard relating to railroad safety." The Court has consistently held that the phrase "state law," when given its ordinary meaning, includes common law as well as statutes and regulations. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (The phrase "requirement or prohibition . . . imposed under State law" includes "obligations that take the form of common law rules."); *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) (The phrase "all other law, including State and municipal law" encompasses state common law.); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (The term "laws," when given its "natural meaning," includes "claims founded upon . . . common law as well as those of statutory origin.").

In this case the plain meaning of the FRSA's preemption language — "law, rule, regulation, order, or standard" —

<sup>21</sup> The Court last term interpreted a similar preemption provision and held that the ordinary meaning of "relating to" is a broad one and that "the words thus express a broad pre-emptive purpose." *Morales*, 112 S. Ct. at 2037.

encompasses state common law. The legislative history of the FRSA strongly suggests that Congress intended to preempt common law claims as well as those based on legislation or regulation.<sup>22</sup> Congress recognized, as this Court has often stated, that the effect of allowing state common law claims to survive would be to regulate train speeds through jury verdicts and damage awards. Most recently in *Cipollone*, the Court reaffirmed the commonsense point that damage actions can have the same effect as affirmative regulation: "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). See also *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

#### A. The Secretary of Transportation Has Promulgated Regulations That Cover the Subject Matter of Train Speeds Through Grade Crossings

In accordance with Congress's directive in the FRSA, the Secretary has adopted comprehensive railroad safety rules. In particular, he has adopted rules covering train speed. These rules set "maximum allowable operating speeds" for railroad travel over nearly all of the nation's track, including the track at issue in this case and all of the track Amtrak uses. 49 C.F.R. § 213.9. Once the Secretary adopts regulations on the subject

<sup>22</sup> See H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4110-11 ("To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce."). See also *id.* at 4109 ("[S]ubjecting the national rail-system to . . . 50 different judicial and administrative systems" would adversely affect rail safety.). The language of the House Report is strikingly similar to that used by this Court in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981): "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress . . . ."

of speed — as he now has — no state may continue in force any speed rule unless it can fit that rule within section 434's savings clause for local safety hazards.<sup>23</sup>

Mrs. Easterwood claims that state law imposes a duty on CSXT to reduce its speed below the federally authorized speed limit when traveling through a crossing that has the characteristics of the Cook Street crossing. Her claim involves a state law concerning a subject matter covered by the Secretary's regulations — train speed — and thus is preempted unless it fits within section 434's savings provision.

Mrs. Easterwood attempts to escape the preemptive effect of the Secretary's speed regulations by arguing that the Secretary set train speed limits only to prevent derailments, not to prevent grade crossing accidents. Her point has no grounding in law or in fact. As the Eleventh Circuit noted, this Court has made clear that preemption analysis is not concerned with whether the federal law's purposes are similar to the state law's purposes. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1554 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992) (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)). *See also Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 612-13 (1926) (State law is preempted whenever "federal and state statutes are directed to the same subject . . . [,] however commendable or however different their purpose."). Preemption analysis turns on Congress's intent to preempt and the nature of the federal regulations at issue. *Easterwood*, 933 F.2d at 1554.

<sup>23</sup> In 1980, Congress directed Amtrak to identify and attempt to eliminate state and local speed restrictions. 45 U.S.C. § 656. Congress stated that when Amtrak consulted with local officials regarding alternatives to a speed restriction, it should take into account "the particular local safety hazard which is the basis for such restriction . . . ." 45 U.S.C. § 656 (emphasis added). This language plainly was drafted to parallel the terms of the savings provision: once the Secretary adopted speed regulations, as he had well before 1980, state and local speed restrictions could survive under § 434 only if they were directed to "local safety hazards."

Moreover, the Secretary in fact took into account many considerations — including grade crossing safety — in promulgating his speed regulations. As explained in greater detail above, there is substantial interplay between the Secretary's speed and grade crossing regulations. Significantly, speed is the constant factor, with grade crossing protections tailored to speeds, instead of speeds reduced to minimize dangers at grade crossings. *See supra* pp. 10-11. The Secretary has expressly stated that in setting higher train speeds, he must be satisfied "that the proposed speed can be sustained in safety" and that his safety concerns are not limited to derailment risk but include grade crossing protection and trespasser control. 49 C.F.R. § 213.9(c). Accordingly, because the Secretary has spoken on the issue of train speeds through grade crossings, Mrs. Easterwood can prevail only if she can fit her claim within section 434's savings provision.

#### **B. The State Common Law Rule Mrs. Easterwood Seeks to Enforce Does Not Fit Within the Savings Provision of Section 434**

In order to fall within the savings provision, a state law must meet each of three separate requirements: (1) it must be "necessary to eliminate or reduce an essentially local safety hazard"; (2) it must not be incompatible with any federal law or regulation; and (3) it must not create an undue burden on interstate commerce. On this record, it is plain that the rule of law Mrs. Easterwood seeks to enforce fails to meet at least the first two requirements, and probably does not satisfy the third.<sup>24</sup>

<sup>24</sup> The undue burden issue was not developed in the district court, and the caselaw does not offer any guidance as to the meaning of "undue burden" in § 434. Courts examining challenges to local speed ordinances brought under the United States Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3, rather than § 434 have consistently held that these ordinances unduly burden interstate commerce. *See Johnson v. Southern Ry. Co.*, 654



**1. The Rule Mrs. Easterwood Seeks to Enforce Does Not Address a "Local Safety Hazard" Within the Meaning of Section 434**

The state common law rule Mrs. Easterwood invokes does not address "an essentially local safety hazard." As the House Report makes clear, Congress intended "local safety hazard" to be narrowly construed:

The purpose of this . . . provision is to enable the States to respond to local situations *not capable of being adequately encompassed within uniform national standards*. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is *no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter*.

H.R. Rep. No. 1194, 1970 U.S.C.C.A.N. at 4117 (emphasis added).<sup>25</sup>

The rule of law Mrs. Easterwood seeks to enforce here — a general duty of reasonable care — is not focused on a particular, identifiable local safety hazard. Rather, it is a broad rule of statewide applicability — precisely the sort of "Statewide

F. Supp. 121, 123 (W.D.N.C. 1987); *Southern Pac. Transp. Co. v. St. Charles Parish Police Jury*, 569 F. Supp. 1174, 1179 (E.D. La. 1983).

Because it is apparent that restrictions at the grade crossings Amtrak traverses would substantially hinder its ability to provide fast, reliable passenger service, and because the evidence indicates that slow train speeds do not lead to greater safety (and in many cases diminish safety), *see supra* pp. 3-4, the rule of law Mrs. Easterwood asserts would appear to constitute an undue burden under both § 434 and the Commerce Clause.

<sup>25</sup> Additional legislative history supports a narrow interpretation of "local safety hazard." *See* 116 Cong. Rec. 27,612 (1970) (statement of Rep. Springer that the savings clause was intended to allow a state to "take charge of purely local hazards").

standard[] superimposed on national standards covering the same subject matter" that Congress intended to forbid. The Eleventh Circuit clearly was correct when it held that the "savings clause is irrelevant to the case at hand because a state does not legislate a general duty of care in order to eliminate a local safety hazard." *Easterwood*, 933 F.2d at 1553 n.3.

Moreover, Mrs. Easterwood's common law claim addresses a hazard — speeds through grade crossings — that is "capable of being adequately encompassed within uniform national standards." Congress so determined when it declared that grade crossing safety should be dealt with on a national level and specifically directed the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem . . ." 45 U.S.C. § 433(b).

In addition, all of the individual elements underlying Mrs. Easterwood's speed claim are capable of being adequately encompassed within uniform national standards, and most in fact are covered by existing standards.<sup>26</sup> Most of the elements — the curve in the tracks, the vegetation, and the hump — chiefly concern a motorist's ability to see an approaching train. Under the Secretary's regulations the motorist's line of sight at a crossing is an express and significant consideration in determining what grade crossing protection is appropriate for safe operation in light of specified train speeds.<sup>27</sup> Sight distance

<sup>26</sup> According to Mrs. Easterwood's certiorari petition, trains have a common law duty to slow down at the Cook Street crossing due to "the numerous hazards at [the] crossing and the large number of motorists who traverse the crossing . . ." The hazards include "a curve in the tracks just north of Cook Street which allows only 150 feet of sight distance for a motorist looking up the track . . . [.] the amount of vegetation allowed to grow along the side of the track, frequently malfunctioning signals which produce false warnings, and a hump in the crossing which make the tracks difficult for drivers of large trucks to maneuver." *Easterwood Cert. Pet.* at 4.

<sup>27</sup> *See, e.g., MUTCD* at 8B-9 (Whether to use stop signs at grade crossings depends, in part, on motorists' line of sight to an approaching train).



analysis takes into account not only curves in the track but also vegetation that hinders visibility and the level of the track relative to that of the road.<sup>28</sup> Accordingly, it is clear that even the individual elements of Mrs. Easterwood's speed claim are capable of being dealt with through uniform national standards, and thus her claim does not fit within the narrow definition of "local safety hazard" Congress intended for the savings provision.<sup>29</sup>

## 2. The Rule Mrs. Easterwood Seeks to Enforce Would Be Incompatible with the Secretary's Speed Regulations

Mrs. Easterwood's speed claim also fails to meet the savings provision's second requirement: the rule of law she posits is incompatible with the Secretary's speed regulations. Mrs. Easterwood's claim is that CSXT violated its state common law duty to slow down to a speed that is "reasonable and

and sight distance down the track while at the stop bar.); *MUTCD* at 8B-5 (Whether to illuminate grade crossing depends, in part, on motorists' ability to see trains during hours of darkness.). See also Highway Research Bd., Nat'l Coop. Highway Research Program Rep. No. 50, *Factors Influencing Safety at Highway-Rail Grade Crossings* 25 (1968) (importance of sight distance in the design and improvement of grade crossings); *DOT Crossings Study* at 5-9, 5-10 (same).

<sup>28</sup> See, e.g., *MUTCD* at 8B-5 (Illumination at a crossing may be required "where the gradient of the vehicular approaches is such that the headlights of an oncoming vehicle shine under or over the [train] cars."). Vegetation at or near the tracks has also been addressed separately by the Secretary in regulations concerning track maintenance. 49 C.F.R. § 213.37 (track owners must contain vegetation so that it does not pose a fire hazard, obstruct visibility, or create other safety hazards). With regard to Mrs. Easterwood's claim concerning the hump in the crossing, standards concerning vertical alignment of the railroad tracks in relation to the roadway are set forth in American Ass'n of State Highway and Transp. Officials, *A Policy on Geometric Design of Highways and Streets* 842-51 (1990) ("AASHTO Policy"). In establishing standards to govern federal aid highway projects, the Secretary has adopted the AASHTO Policy as law. 23 C.F.R. pt. 625.

<sup>29</sup> With respect to the final "hazard" of Mrs. Easterwood's speed claim — frequently malfunctioning signals — the legal analysis is clear. As both

prudent under the circumstances." The circumstances for which CSXT allegedly failed to slow down involve no extraordinary conditions that existed on the morning of February 24, 1988; they are present every day at the Cook Street crossing and, most likely, at hundreds of other crossings in Georgia and throughout the United States.<sup>30</sup> Therefore, the thrust of her state law claim is to force trains routinely to pass through the Cook Street crossing at a speed that is lower than the speed limit set by the Secretary.

That rule of law plainly is incompatible with the Secretary's regulations. In setting maximum operating speeds the Secretary expressly engaged in cost-benefit analysis. 36 Fed. Reg. at 11,974. One of his goals was to authorize the highest possible speeds consistent with Congress's safety goals. He thus set speeds as high as he deemed safe in order to authorize

CSXT and AAR note in their briefs, the savings provision leaves room for state common law claims alleging violations of federal safety standards, including those the Secretary has issued concerning signals. However, Mrs. Easterwood's approach — a legal rule that would effectively require trains to operate at slower speeds — is incompatible with the Secretary's approach to speeds at grade crossings; moreover, it is unduly burdensome, effectively requiring all carriers using a line to become familiar with the status of the home railroad's maintenance efforts.

<sup>30</sup> A few cases have addressed claims brought under state law that a railroad failed to reduce its speed when faced with a sudden and extraordinary dangerous condition or event. *Central of Ga. R.R. Co. v. Markert*, 410 S.E.2d 437, 439 (Ga. App. 1991) (claim that railroad employees failed to take precautions after it was apparent that vehicle was about to cross the track not preempted), *cert. denied*, 200 Ga. App. 895 (1991); *Florida E. Coast Ry. v. Griffin*, 566 So. 2d 1321, 1324 (Fla. Dist. Ct. App. 1990) (claim that railroad employees failed to issue a stop order when it became apparent that children were about to cross the track not preempted). These cases stand for the proposition that federal law will not absolve a railroad of its duty to act with reasonable care when faced with an extraordinary circumstance or event such as persons, animals, vehicles, or other obstacles suddenly appearing in plain view on the roadbed. Because Mrs. Easterwood has not raised such a claim, the Court need not reach this issue.

trains to operate at those speeds. The Secretary was explicit that he was establishing speeds that could be safely *sustained*, not maximum speeds that were to be reduced routinely based on recurring operational considerations. *See, e.g.*, 49 C.F.R. § 213.9(c). Setting a lower maximum speed is inconsistent with the purposes of the Secretary's rules.

Incompatibility is all the more apparent in light of the Secretary's decision to authorize prescribed speeds *through grade crossings*. As Amtrak noted above in response to Mrs. Easterwood's arguments that the Secretary's speed regulations deal only with the risk of derailment, the Secretary in fact squarely faced the problem of grade crossings and opted to build other precautions around prescribed speed limits rather than to vary speed based on the hazardous characteristics of each crossing.<sup>31</sup> He has adopted speed limits that can be sustained in crossings, with the safety of those crossings assured through careful review of potential hazards, such as limited visibility, and the subsequent installation of appropriate warning devices. A common law rule prescribing lower speeds in crossings would conflict directly with the Secretary's chosen approach.<sup>32</sup>

<sup>31</sup> As noted above, one of the precautions that is built around prescribed speed limits is properly timed warning signals. This element of the Secretary's regulations highlights a risk of imposing a common law duty on railroads to slow down based on varying perceptions of hazards at specific grade crossings: as trains slow down to promote safety, they may be traveling at speeds that render the timing of signal circuits inappropriate and even dangerous. *See supra* p. 11.

<sup>32</sup> Because of this fundamental incompatibility, even in the absence of § 434, Mrs. Easterwood's common law rule would be preempted on the theory of conflict preemption. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977).

## CONCLUSION

This case presents a clear instance of express federal preemption. The Secretary's regulations deal squarely with the issue of train speeds through grade crossings, and thus there is no room for Mrs. Easterwood's claim under section 434. Accordingly, Amtrak supports affirmance of the Court of Appeals in No. 91-1206, as well as reversal in No. 91-790.

Respectfully submitted,

Stephen C. Rogers  
Charles E. Mandolia  
National Railroad Passenger  
Corporation  
60 Massachusetts Avenue, N.E.  
Washington, D.C. 20002  
(202) 906-3995

Paul F. Mickey, Jr.\*  
Alvin Dunn  
Shaw, Pittman, Potts &  
Trowbridge  
2300 N Street, N.W.  
Washington, D.C. 20037  
(202) 663-8000

*Counsel for Amicus*

August 27, 1992

\*Counsel of Record